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IN THE

Supreme Court of the United States

October Term, 1994

JOSEPH P. NAPOLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

PATRICK M. WALL
36 West 44th Street
New York, New York 10036
(212) 840-7188

Counsel of Record for Petitioner

DICK BAILEY SERVICE (212) 608-7666 (718) 447-5358 (516) 222-2470 (914) 682-0848 Fax: (718) 273-8031
1-800-564-4918

TABLE OF CONTENTS

Pages

I. Introduction 1

II. Argument 2

III. Conclusion 6

TABLE OF AUTHORITIES

Engle v. Isaac, 456 U.S. 107 (1982) 4

Hill v. United States, 368 U.S. 424 (1962) 3

Murray v. Carrier, 477 U.S. 478 (1986) 4

Sawyer v. Whitley, 112 S. Ct. 2514 (1992) 4

Smith v. Murray, 477 U.S. 527 (1986) 4

United States v. Addonizio, 442 U.S. 178, 184 (1979) 2

United States v. Frady, 456 U.S. 152, 165 (1982) 2

United States v. Quintanilla, 2 F.3d 1469 (7th Cir. 1993) 5

United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), *cert. denied,* 452 U.S. 961 (1981) 5

United States v. Thai, 29 F.3d 785 (2d Cir.), *cert. denied,* 115 S. Ct. 456 (1994) 4

United States v. Timmreck, 441 U.S. 780 (1979) 2

Pages

United States v. Viola, 35 F.3d 37 (2d Cir. 1994)..... 5

United States v. Wong, No. 92-1602 (2d Cir. Nov. 8, 1994) 4, 5

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PETITIONER'S REPLY BRIEF

I. Introduction

By the way the Government has rewritten the "Questions Presented' (Government Brief ["GB"] I), it has shown that it misapprehends the nature of the issue Napoli has placed before this Court. The Government believes, it seems, that Napoli claims to be aggrieved solely by a simple failure of a district court to charge a jury with precision as to the elements of the crime with which he was charged. Were the Government's understanding of the issue correct, Napoli's petition would never have been written.

We bring to this Court, however, a horse of quite a different color. Napoli's complaint--pure and simple--is that he was tried upon a charge the elements of which, through no fault of his own, he did not completely know and a defense to which was *withheld* from him by well-settled rulings of the very circuit in which he was tried.

II. Argument

1. The Government's claim (GB 2) that Napoli "helped direct the affairs of the Eisen firm by trying cases and obtaining favorable settlements . . ." and its reliance (GB 6 n.4) upon a supportive finding by the district court beg the very question involved here. It ill behooves the Government to rely upon a finding based upon evidence which Napoli was forbidden to contest.

2. The Government's uncertainty (GB 7 n.5) as to whether Napoli contests the conspiracy conviction as well as the one under the substantive RICO count should be laid to rest. He does. It would, indeed, be foolish of him and wasteful of this Court's time for him to challenge only *one* of two convictions as to which he received *equal concurrent* sentences. Moreover, the Government's substantive argument on this point is in error. Whatever the law in other cases may be, the district court at trial, without Governmental objection, charged that Napoli could not be found guilty of the conspiracy count without also being found guilty of the substantive count. (Trial Transcript at 9150; Second Circuit Appendix at A102).

3. We recognize, as this Court proclaimed in *United States v. Addonizio,* 442 U.S. 178, 184 (1979) (GB 8) that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment" and that, as stated in *United States v. Frady,* 456 U.S. 152, 165 (1982), "a collateral challenge may not do service for an appeal." Nonetheless, neither *Addonizio* nor *Frady* involved a situation where the defendant, in defending himself at trial, was faultlessly blind to the helpful issue he later raised. Indeed, in *United States v. Timmreck,* 441 U.S. 780 (1979), cited at GB 8, this Court pointed out, in denying relief under section 2255, that the defendant had not argued that he had been unaware in the district court of

the legal issue he had raised, not on direct appeal,[1] but when seeking post-conviction relief.

4. The Government's reliance (GB 8) upon *Hill v. United States,* 368 U.S. 424 (1962), is misplaced. There, this Court held that the failure of a trial court to ask whether a defendant represented by an attorney has anything to say before sentence is imposed is not an error of sufficient magnitude to be cognizable under a writ of habeas corpus. It was not, noted this Court at 428, "an omission inconsistent with the rudimentary demands of fair procedure."[2] We submit, however, that such "rudimentary demands" include, at the very least, notice as to the nature of the crime charged and the defenses available and an opportunity to present a valid defense. Those aspects of fair procedure were lacking here.

5. The Governmental claim (GB 9) that "it is doubtful that petitioner even preserved his *Reves* claim on direct appeal by raising it for the first time in his reply brief and a rehearing petition" is based (GB 9 n.6) upon cases which are clearly inapplicable. None of them involves, as does this one, a situation where the claim was first raised in the reply brief only because the basis of the claim did not previously exist. Here, *certiorari* was granted in *Reves* on February 24, 1992--*after* Napoli's original brief had been filed in the Second Circuit. We note also that the Second Circuit, which *has* relied upon such a rule (see GB 9 n.6) did not do so here, obviously, we submit, because it knew

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1. Here, Napoli raised the *Reves* issue in his reply brief on direct appeal.

2. The Court pointed out, at 429, that *Hill* did not involve "a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed." Here, of course, the well-settled Second Circuit *Scotto* rule prevented the offering of a defense that Napoli had *not* participated in the management or control of the enterprise.

that Napoli could not have reasonably been expected to raise the issue until he filed the reply brief.

6. Cases such as *Sawyer v. Whitley,* 112 S. Ct. 2514 (1992), *Murray v. Carrier,* 477 U.S. 478 (1986), *Smith v. Murray,* 477 U.S. 527 (1986) and *Engle v. Isaac,* 456 U.S. 107 (1982), relied upon by the Government (GB 9) on grounds of "finality," are not truly applicable here since, as this Court noted in *Engle* at 134, "federal habeas challenges to *state* convictions . . . entail *greater* finality problems and *special* comity concerns." (Emphasis added.) Moreover, those cases do not involve a post-trial change in governing law.

7. The Government's argument (GB 9) that Napoli is saddled with at least the "plain error" rule because Rule 30 required him "to raise his claim of instructional error" in the trial court once again betrays the Government's misapprehension of Napoli's basic point--*viz,* that bringing him to trial in court-created ignorance of a valid defense violated his rights to due process of law.

8. The Government's reliance (GB 10) upon the Second Circuit's recently-decided *United States v. Thai,* 29 F.3d 785 (2d Cir.), *cert. denied,* 115 S. Ct. 456 (1994) and *United States v. Wong,* No. 92-1602 (2d Cir. Nov. 8, 1994) is misplaced. In *Thai,* no argument was made--as was made here--that the defendant was deprived of his constitutional right to know of, and to present, a defense. *Wong* likewise involved no such claim and, indeed, even though *certiorari* had been granted in *Reves* well before the *Wong* trial began, the defense did not focus on the *Reves* issue at jury-instruction time. Those cases are not this.

9. The Government argues (GB 11) that to provide Napoli with relief under Section 2255 "would produce an anomalous result" in that "an error that could not have been corrected on direct appeal would nevertheless form the basis for collateral relief" which generally requires a petitioner to surmount a "higher hurdle." No such anomaly

exists, especially since the error could--and should--have been corrected, and Napoli granted relief, on direct appeal, when he raised the issue in his reply brief. The *Reves* issue was treated on the merits in *United States v. Quintanilla,* 2 F.3d 1469 (7th Cir. 1993), even though it had not been raised at trial, despite the "plain error" rule which the Government now invokes.[3] It could, and should, have been dealt with on the merits by the Second Circuit. That it was not is no fault of Napoli's and it is therefore unfair to impose upon him the stricter standard of review, even though, as noted in the original petition at 12-13, the facts of his case satisfy that standard.

10. The Government argues (GB 11-12) that Napoli's failure to raise the *Reves* issue at trial was not excusable on grounds of futility. But the Second Circuit itself disagrees. In *United States v. Viola,* 35 F.3d 37, 40 (2d Cir. 1994), it described *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980), *cert. denied,* 452 U.S. 961 (1981) as "the previously settled law of this circuit." And in *United States v. Wong,* No. 92-1602 (2d Cir. Nov. 8, 1994) slip op. at 8041, the Second Circuit stated that:

> [I]t is unclear what purpose is served by a rule requiring a party to object in district court to an instruction that is required by settled circuit precedent simply because the Supreme Court has

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3. The Government's distinction (GB 13) between *Quintanilla* and this case lacks merit. In each, for obvious reasons, the *Reves* issue was not raised at trial. In each, that issue was raised on *direct* appeal "at the first opportunity." The Seventh Circuit chose to reach the merits of the claim. The Second Circuit has relegated Napoli's *Reves* issue to one which requires him to meet at least the "plain error" standard. That, we submit, constitutes disparate treatment.

> undertaken to review the instruction. That is, until the Supreme Court rules otherwise, the district court would be obliged to follow our precedent, even if that precedent might be overturned in the near future.

Here, Napoli's position is even stronger, since this Court did not grant *certiorari* in *Reves* until after his trial was over. The Government thus seeks to prevent Napoli from receiving relief by reliance upon an obstacle which not even the Second Circuit had placed across his path.

11. The Government's argument (GB 12-13 & n.8) that Napoli was not denied "an opportunity to be heard" and, because of the wording of the instructions, could have "put on a vigorous defense that he lacked the ability to control or manage" the enterprise, is totally baseless. Any such attempt on Napoli's part would have been thwarted by an immediate prosecutorial objection as to relevance. That objection would have been immediately sustained, since that is what *Scotto* was all about. If the Government is correct, then *Reves* changed no Second Circuit rule or practice. No member of bench or bar in this Circuit believes that to be so.

III. Conclusion

For the foregoing reasons, and those advanced in the original petition, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

PATRICK M. WALL
36 West 44th Street
New York, New York 10036
(212) 840-7188
Counsel of Record for Petitioner

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